

1 **WO**

2
3
4
5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Lion Electric Company,
10 Plaintiff,
11 v.
12 Nikola Corporation,
13 Defendant.
14

No. CV-23-00372-PHX-DGC
ORDER

15 Nikola has filed three motions for letters rogatory, asking the Court to initiate the
16 process of obtaining depositions of three witnesses in Canada. The motions come only
17 weeks before the close of discovery and are opposed by Lion.

18 The fact discovery deadline in this case is October 31, 2024, after being extended
19 once for good cause. Doc. 52. The Court's scheduling order specifically states: "The
20 parties are advised that the Court intends to enforce the deadlines set forth in this Order,
21 and should plan their litigation activities accordingly." Doc. 39 at 4. The fact discovery
22 period commenced on October 18, 2023. Doc. 39 at 1. The parties have had more than a
23 year to complete depositions and other fact gathering, and yet Nikola did not file its motions
24 for letters rogatory until September 27, 2024, just over one month before the close of
25 discovery. Docs. 77-80.

26 The decision to issue letters rogatory rests within the discretion of the court. *United*
27 *States v. Sedaghaty*, 728 F.3d 885, 917 (9th Cir. 2013). In the Court's experience, letters
28 rogatory can take many months to produce a witness in a foreign country. Issuing letters

1 rogatory at this late stage of the litigation would result in fact discovery extending well
2 beyond the October 31, 2024 deadline.

3 Rule 16 provides that a discovery deadline set by the Court may “be modified only
4 for good cause[.]” Fed. R. Civ. P. 16(b)(4); *see Johnson v. Mammoth Recreations, Inc.*,
5 975 F.2d 604, 608 (9th Cir. 1992). The good cause standard primarily considers the
6 diligence of the party seeking the amendment. *Id.* at 609. “The district court may modify
7 the pretrial schedule ‘if it cannot reasonably be met despite the diligence of the party
8 seeking the extension.’” *Id.* (quoting Fed. R. Civ. P. 16 advisory committee’s notes (1983
9 amendment)). Where a party has not been diligent, the inquiry ends and the motion is
10 denied. *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002); *Johnson*, 975
11 F.2d at 609.

12 The question, then, is whether Nikola could through reasonable diligence have
13 completed the letters rogatory process by the discovery deadline.

14 **A. Jean Bazinet.**

15 Nikola seeks to depose Jean Bazinet, Lion’s former Procurement Director. Nikola
16 argues that his testimony is directly relevant because he was involved in the contract
17 negotiations and battery procurement that are at the heart of this dispute. Doc. 87 at 5.
18 Lion argues that Nikola’s motion is untimely.

19 Nikola has known the importance of Mr. Bazinet for many months. Its own motion
20 states that he “provided significant testimony in the related arbitration” between Lion and
21 Romeo that was instituted on October 26, 2022. Doc. 87 at 2. Mr. Bazinet submitted a
22 witness statement in that arbitration on June 2, 2023. Doc. 92 at 3 & Ex. A. What is more,
23 Nikola identified Mr. Bazinet as a person likely to have discoverable information in its
24 initial disclosure statement served almost one year ago. *Id.* Ex. B. Nikola asked Lion on
25 July 22, 2024, if Lion could present Mr. Bazinet for a deposition, and Lion responded one
26 week later stating that it did not represent him. *Id.* Ex. D. And yet Nikola waited two
27 months to seek a letter rogatory.
28

1 Nikola argues that it waited to review Lion’s full document production before
 2 deciding whether to depose Mr. Bazinet, but Nikola itself states that he provided significant
 3 testimony more than a year ago, and Nikola listed him as a person with relevant knowledge
 4 in its initial discovery disclosures. Nikola also asserts that the importance of deposing Mr.
 5 Bazinet became clear just weeks ago on October 2, 2024, when another deponent in this
 6 case testified that Mr. Bazinet was the right person to answer questions. But that testimony
 7 clearly was not the impetus for this motion – Nikola filed this motion before the October 2
 8 deposition. Doc. 78.

9 In short, Nikola has known of Mr. Bazinet’s relevance to this case for more than a
 10 year and yet did not take steps to depose him until weeks before the close of discovery.

11 **B. Patrick Judson Kenney.**

12 Mr. Kenney served as Lion’s Senior Vice President, Procurement & Supply Chain.
 13 Doc. 88 at 2. Like Mr. Bazinet, he provided what Nikola characterizes as “significant
 14 testimony” in the related arbitration. *Id.* In fact, Nikola states that Kenney provided
 15 arbitration testimony on “key issues in this federal case.” *Id.* Mr. Kenney submitted a
 16 witness statement in the arbitration on June 2, 2023. Doc. 93 at 3 & Ex. A. And Nikola
 17 identified Mr. Kenney as a person likely to have discoverable information in its own initial
 18 disclosures served on November 10, 2023. Further, Lion informed Nikola on July 22,
 19 2024, that it could not present Mr. Kenney for a deposition, and yet Nikola waited more
 20 than two months to file this motion. *Id.* at 3.¹

21 Nikola argues that it acted in a timely manner because Lion did not add Mr. Kenney
 22 to its disclosure statement until September 27, 2024, stating that he may have discoverable
 23 information on various facts in this case. But Nikola had so identified Mr. Kenney almost
 24 a year earlier in its initial disclosures. Doc. 93-1 at 15. In short, Nikola has known of Mr.
 25 Kenney’s relevance to this case for more than a year and yet did not take steps to depose
 26 him until weeks before the close of discovery.

27
 28 ¹ Lion previously had agreed to present Mr. Kenney for a deposition, but he declined
 to appear when Nikola refused to pay his consulting fee. Doc. 88 at 3.

1 **C. Lion Customer.**

2 Nikola's third request concerns a Lion customer based in Canada. Nikola seeks to
 3 depose a representative of the customer because Lion has identified the customer as one
 4 which cancelled its contract for Lion trucks as a consequence of not receiving battery packs
 5 from Romeo. Doc. 89 at 2. But Lion identified the customer for Nikola on March 20,
 6 2024, and identified the substantial amount of revenue Lion allegedly lost when the
 7 customer's contract was cancelled. Doc. 94-1 at 28. In March and April 2024, the
 8 customer was identified in discovery responses and included discovery search terms, and
 9 Nikola noticed the depositions of four other customers who allegedly had cancelled
 10 contracts. *Id.* at 3 & Exs. B & C. Nikola argues that Lion did not add a representative of
 11 the customer to its initial disclosures until September 27, 2024, but Nikola knew about the
 12 customer and its claimed loss six months earlier and yet took no steps to schedule the
 13 deposition.

14 **D. Conclusion.**

15 Nikola was well aware of these witnesses and their relevance to this case long before
 16 it acted to depose them, and they could have been deposed within the year allowed for fact
 17 discovery through reasonable diligence. As a result, good cause to extend the discovery
 18 schedule does not exist under Rule 16(b)(4) and the Court will not issue the requested
 19 letters rogatory.

20 **IT IS ORDERED** that Nikola's corrected motions for letters rogatory (Docs. 87,
 21 88, 89) are **denied**. The motions have been lodged under seal, but no motion to seal has
 22 been filed. *See* Doc. 86. The Court rules on them nonetheless because the close of
 23 discovery is fast approaching. The lodging of these documents, and the generally
 24 unworkable state of the docket (*see* Doc. 98), appears to be due to the parties' inability to
 25 work together and reach reasonable agreements. *See, e.g.,* Doc. 86. The parties shall confer
 26 and promptly submit a stipulation on the proper filing treatment of Docs. 78-80 and 87-89.

27 Dated this 23rd day of October, 2024.

28 